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No. 84-1470

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

CLARENCE FRANCOIS,
Petitioner,

VS.

RAYBESTOS-MANHATTAN, INC., et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT FLEXITALLIC GASKET COMPANY, INC. IN OPPOSITION

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COUNTERQUESTION PRESENTED

Whether certiorari should be granted to review the decision of the Ninth Circuit Court of Appeals affirming denial of admiralty jurisdiction to a tort action by a worker arising from exposure to asbestos on ships being repaired.

CORPORATE STATEMENT

Respondent Flexitallic Gasket Company, Inc., is a wholly-owned subsidiary of Turner-Newall Industries, Inc.

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COUNTERSTATEMENT OF THE CASE

Petitioner brought his action in the United States District Court for the Northern District of California, claiming jurisdiction in admiralty under 28 U.S.C. § 1333. He alleges he "worked in the repair of completed vessels involved in service in water-based commerce and that his handling of and/or exposure to asbestos products referred to herein arose during such activity." Pet. 4.

Upon motion, the United States District Court ordered dismissal of the action for lack of subject matter jurisdiction. *Francois v. Raybestos-Manhattan, Inc.*, 577 F. Supp. 434 (N.D. Cal. 1983).

Petitioner appealed, and the judgment of dismissal was affirmed by the United States Court of Appeals for the Ninth

Circuit, which found that petitioner's claims lacked sufficient relationship to traditional maritime concerns to invoke admiralty jurisdiction. Pet. 6.

The facts of this case are stated fully in the decision of the District Court (Pet.'s App. 1).

ARGUMENT

1. There Is No Conflict Among the Courts of Appeal

Petitioner states, *inter alia,* that the question here presented concerns the application of admiralty jurisdiction to a worker exposed to asbestos while working on vessels undergoing *repair.* (Pet. i; emphasis added.) In support of his argument of intercircuit conflict, however, he cites two cases in which admiralty jurisdiction was denied on the ground that torts occurring during *construction* of new vessels lack significant relationship to traditional maritime activities. *Keene Corp. v. United States,* 700 F.2d 836 (2d Cir. 1983), *cert. denied,*_____U.S._____, 104 S.Ct. 195 (1983); *Owens-Illinois, Inc. v. United States Dist. Court,* 698 F.2d 967 (9th Cir. 1983). Similarly, petitioner urges that a Fifth Circuit case dealing solely with the sufficiency of the allegations of a complaint in a declaratory relief action somehow creates a conflict. Significantly, that case did not reach the issue of whether shipyard repair falls within admiralty jurisdiction. (*Lowe v. Ingalls Shipbuilding, a Div. of Litton,* 723 F.2d 1173, 1190 (5th Cir. 1984).

These cases are factually irrelevant to and raise legal issues different from the case at hand. As such, they create no conflict among the Circuits on the specific question presented by the petitioner.

The leading case of *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249, 268 (1972), requires that a wrong have both a maritime "location" and a "significant relationship to traditional maritime activity" before admiralty jurisdiction will lie. Each Circuit which has decided the issue of whether a shipyard worker exposed to asbestos during the repair of vessels may invoke admiralty jurisdiction has analyzed the facts of their

particular case, and applied this test. (*Austin v. Unarco Industries, Inc.*, 705 F.2d 1, 6 (1st Cir. 1983), *cert. dismissed*, ____ U.S. ____, 194 S.Ct. 34 (1983); *Myhran v. Johns-Manville Corp.*, 741 F.2d 1119, 1120-1121 (9th Cir. 1984); *Harville v. Johns-Manville Products Corp.*, 731 F.2d 775, 780-781 (11th Cir. 1984); *White v. Johns-Manville Corp.*, 662 F.2d 234, 239 (4th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).)

Thus, a uniform rule on the applicability of admiralty jurisdiction in the context at hand exists and is used. Petitioner can point to no conflict, as there is none.

Petitioner characterizes the *White* decision as proof of an irreconcilable conflict, since it is the only Court of Appeals case which has extended admiralty jurisdiction to shipyard workers claiming injury from asbestos exposure during vessel repair work. This conflict is illusory, since *White's* grant of jurisdiction turned on evidence produced at trial that, "... the materials used by these shipyard workers were designed, advertised and marketed as maritime asbestos products, and the *Executive Jet* criteria have been met and admiralty jurisdiction should be exercised." *White v. Johns-Manville Corp., supra*, 662 F.2d at 240. Thus, *White* decided that proof of the intended use of the asbestos products satisfied the nexus requirement of *Executive Jet*, and that *on such facts* admiralty jurisdiction would be applied.

A close review of petitioner's complaint and his petition shows that he has not alleged (nor offered any proof) that the asbestos he was exposed to was meant for maritime use, although he informs this Court that he has. Pet. 4, 11. This failure was noted by the District Court below. (*Francois v. Raybestos-Manhattan, Inc.*, 577 F. Supp. at 438.) As a result, petitioner can take neither comfort nor advantage from attempting to manufacture a conflict from *White* since, on its facts, *White* does not apply to his case. Factual differences among the cases necessarily require variation in analysis; where the same test is used, however, a different result based on those factual differences does not create a conflict.

2. The Correct Result Was Reached Below

As shown above, all Circuits addressing the facts and issues presented by petitioner have concluded that shipyard workers alleging injury from asbestos while working on ship repair may not invoke admiralty jurisdiction for their claims. Both the District Court below and the Ninth Circuit Court of Appeals have reached the same decision as to petitioner, using the same precedent as its sister circuits.

3. The Scope of Admiralty Jurisdiction Should Not Include Petitioner's Claim

This Court has long held that admiralty jurisdiction be extended only with caution, and only in accord with strict statutory construction. *Healy v. Ratta,* 292 U.S. 263, 270 (1934); *Victory Carriers, Inc. v. Law,* 404 U.S. 202, 211-212 (1971), *reh'g denied,* 404 U.S. 1064 (1972).

The Courts of Appeal have consistently refused to extend admiralty jurisdiction to claims such as petitioner's, finding they have no impact on maritime commerce. (See *Harville v. Johns-Manville Products Corp., supra,* 731 F.2d at 786.) Petitioner's alleged injuries are identical to those occurring to non-shipyard workers exposed to asbestos. He does not need the admiralty court to resolve his suit, and the federal courts must not be made to assume any added burden.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Dated: April 9, 1985

Respectfully submitted,

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